Supreme Court, U.S.
FILED
SEP 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-191

In The

Supreme Court of the United States

October Term, 1990

DAVID M. BUCKLEY and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,

Petitioners,

v.

TAMMIE R. ELLIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

JOHN G. SALMON
Counsel of Record
MARK L. ANDERS
FRANCINE R. SALAZAR
SALMON, GODSMAN & NICHOLSON, P.C.
Salmon Law Building
7450 E. Progress Place
Englewood, CO 80111
Counsel for Respondent

BEST AVAILABLE COPY

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction where no constitutional or federal question was ever raised in either the Colorado trial or appellate courts.

2. Whether Colorado law violates due process by allowing the jury to award punitive damages under adequate standards provided by Colorado statutes, jury instructions, and case law?

3. Whether Colorado law violates due process by allowing the jury to award both punitive damages and separate compensatory damages for intentional infliction of emotional distress (outrageous conduct) under appropriate circumstances?

4. Whether the award of punitive damages was both warranted and reasonable under the unique facts of this case.

5. Whether any alleged violation of due process in this case was cured by the remittitur granted by the trial court, and Colorado appellate judicial review of the awards for outrageous conduct and punitive damages under Colorado statutes and common law?

6. Whether all issues presented are now moot as a matter of law.

TABLE OF CONTENTS

PAGE

RESTATEMENT OF QUESTIONS PRESENTED.. i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

SUMMARY OF REASONS FOR DENYING THE PETITION..... 1

STATEMENT OF THE CASE..... 4

I. INTRODUCTION..... 4

II. STATEMENT OF FACTS..... 11

ARGUMENT/REASONS FOR DENYING THE PETITION..... 31

I. PETITIONERS HAVE MISSTATED THE EVIDENCE 31

II. THIS COURT LACKS JURISDICTION..33

III. DEFENDANT-PETITIONERS HAVE MISSTATED THE FACTS, EVIDENCE AND LAW OF THIS CASE TO CONFORM THEM TO ANOTHER CASE PRESENTLY BEFORE THE COURT UNDER VERY DIFFERENT FACTS...41

IV. EVEN ASSUMING ARGUENDO THAT A PROPER ISSUE UNDER FEDERAL LAW EXISTS, THE STANDARDS FOR THE IMPOSITION OF EXEMPLARY DAMAGES UNDER COLORADO STATUTES, JURY INSTRUCTIONS AND CASE LAW ARE CONSISTENT WITH THE DUE PROCESS CLAUSE AND THE HOLDINGS OF THIS COURT. THE CASES CITED BY PETITIONERS

ARE WHOLLY DISTINGUISHABLE AND NOT CONTROLLING. THE EXEMPLARY DAMAGES AWARDED BY THE JURY IN THE PRESENT CASE ARE NOT GROSSLY EXCESSIVE, ARE CLEARLY REASONABLE, AND ARE IN AN APPROPRIATE RATIO TO THE COMPENSATORY DAMAGES ALSO AWARDED BY THE JURY.....43

V. THE AWARD OF BOTH "EXEMPLARY" OR "PUNITIVE" DAMAGES (TO PUNISH THE WRONGDOER AND SET AN EXAMPLE) AND DAMAGES FOR OUTRAGEOUS CONDUCT (COMPENSATORY DAMAGES FOR INJURIES CAUSED BY INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS) IS IN NO SENSE A "DOUBLING UP", DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION, AND DOES NOT EVEN RAISE A CONSTITUTIONAL QUESTION.....51

VI. ALL VIABLE ISSUES ARE NOW MOOT AS A MATTER OF LAW.....54

CONCLUSION.....56

TABLE OF AUTHORITIES

Case — Page

Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959).....37

Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974).....45

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219 (D.Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert. denied, 434 U.S. 1052 (1976).....9,45

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. __, 109 S.Ct. 2909 (1989).....49

Carlson v. Green, 446 U.S. 14, 22 n.9 (1980).....49

Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. App. 1985).....46

Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948).....38

Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388 (1920).....41

DeBacker v. Brainard, 396 U.S. 28 (1969).....55

DeCicco v. Trinidad Area Health Association, 573 P.2d 559 (Colo. App. 1977).....52

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959).....36

E.F. Hutton & Co. v. Anderson, 42 Colo. App. 497, 596 P.2d 413 (1979).....45,48

Enright v. Graves, 560 P.2d 851 (Colo. 1977).....45,52,54

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968), rehearing denied 393 U.S. 901 (1968)..55

Fletcher v. Western National Life Insurance Co., 89 Cal. Rptr. 78 at 95 (C.A. 4th Dist., 1970).....53

Frick v. Abell, 602 P.2d 852 (1979)...47

Gilardi v. Schroeder, 672 F.Supp. 1043 (N.D. Ill. 1986).....53

Hull v. Burr, 234 U.S. 712 (1914).....36

Kimball v. Kimball, 174 U.S. 158 (1899).....55

Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961).....52,53

Leidhold v. District Court, 619 P.2d 768 (Colo. 1980).....46

Little v. Bowers, 134 U.S. 547 (1890).55

Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554 (CA 7 Ind. 1986).....39

Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982).....47

Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152 (1981).....9,53

Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).....38

Meiter v. Cavanaugh, 580 P.2d 399 (Colo. 1978).....52

Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980).....46

Montgomery Wards Co., Inc. v. Andrews, 736 P.2d 40 (Colo. App. 1987).....8,51

New Haven Inclusion Cases, 399 U.S. 392 (1970).....37

New York Times v. Sullivan, 376 U.S. 254 (1964).....6

Pacific Mutual v. Haslip, 110 S.Ct. 1780, 108 L.Ed. 2d 782, cert granted April 2, 1990.....5,34,41,42,43,48

Palmer v. A.H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984).....9,46,47,48

Parker v. McLain, 237 U.S. 469 (1915).36

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).....6

Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960).....39

Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970).....52

Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334 (1959).....36

San Juan Light & Transit Co. v. Requena, 224 U.S. 89 (1912).....38

Shelley v. Kraemer, 334 U.S. 1 (1948).37

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).....37

Socialist Labor Party v.Gilligan, 406 U.S. 583 (1972).....6

Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987).....51

Spiegel's Estate v. C.I.R., 335 U.S. 701 (1949).....37

State Rubbish Etc. Ass'n v. Silizmoff, 38 Cal.2d 330, 240 P.2d 282 (1952)....53

Tacon v. Arizona, 410 U.S. 351 (1973).31

Texas & P.R.Co. v. Abilene Cotton Oil Co., 204 U.S. 426.....38

Thomas v. Taylor, 224 U.S. 73 (1912)..38

United Rys & Electric Co. of Baltimore v. West, 280 U.S. 234 (1930).....37

UNR Industries, Inc. v. Continental Ins. Co., 607 F.Supp. 855 (D.C. Ill. 1984).....53

U.S. v. Durham Lumber Co., 363 U.S. 522 (1960).....37

U.S. v. Kimball Foods, Inc., 440 U.S. 715 (1979).....37

Walford v. Blinder, Robinson and Co., Inc., 793 P.2d 620 (Colo.App.1990).46,47

Weade v. Dickmann, Wright & Pugh, 337 U.S. 801 (1949).....36,38

Wegner v. Rodeo Cowboy's Ass'n, 290 F. Supp. 369 (D.Colo. 1968) aff'd and rehearing denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903 (1970).....48,52

Williams v. U.S., 341 U.S. 97 (1951)..55

Statutes — Page

28 U.S.C. §1251(a).....33,34

28 U.S.C. §1257.....2,5,34,39,41,58

28 U.S.C. §1257(3).....34

29 U.S.C. §2001, et. seq, Employee Polygraph Protection Act of 1988.....4,7,8,54

C.R.S. §13-21-102.....3,7,41,43,48,54

C.R.S. §13-21-102(1)(a) (1987 Repl.Vol. 6A).....46

Other Authorities — Page

American Constitutional Law, Tribe, 861 - 890 (2nd Ed. 1988).....7

Colorado Appellate Rules (Rule 54).....35

Colorado Jury Intructions - Civ. 2d 5:3 (1980).....44

Restatement (Second) of Torts, §46 (1965).....8,52

Rules of the Supreme Court of the United States, Rule 10.....2,39,54

NO. 90-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID M. BUCKLEY and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

This case comes before the Court on a Petition by defendants-appellants below, for a writ of certiorari.

SUMMARY OF REASONS FOR DENYING THE PETITION

The petition provides no adequate reason for this Court to grant certiorari and should be denied for the following reasons:

1. Petitioners have presented no special or important reasons for granting a review on writ of certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States (1990). To the contrary, Petitioners have grossly misstated the facts and are attempting, for the first time, to convert disputed factual issues which have been resolved against them by a jury and affirmed by a state appellate court into novel constitutional questions.

2. This Court lacks jurisdiction since no federal question has ever been previously raised in a Colorado trial or appellate court, thereby divesting this Court of jurisdiction pursuant to 28 U.S.C. §1257.

3. Even assuming arguendo that a proper issue under federal law exists, the standards for the imposition of exemplary damages under Colorado statutes, jury instructions, and case law are consistent with the due process clause and the holdings of this Court. The cases

cited by Petitioner are wholly distinguishable and not controlling. The exemplary damages awarded by the jury in the present case are not grossly excessive, are clearly reasonable, and are in an appropriate ratio to the compensatory damages also awarded by the jury.

4. The award of both exemplary or punitive damages (to punish the wrongdoer and set an example) and damages for outrageous conduct (compensatory damages for injuries caused by intentional or reckless infliction of emotional distress) is in no sense a "doubling up", does not violate due process, and does not even raise a constitutional question.

5. All viable issues are now moot as a matter of law. Colorado amended C.R.S. (1973) §13-21-102 in 1986 to provide an even more detailed statute covering punitive damages, and the Federal Government has pre-empted the area of civil law addressed on this action by

passing the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, et. seq.

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioners asserted the issues of due process and equal protection for the first time after they had exhausted their appellate rights in the Colorado judicial system. Following the denial of their Petition for Certiorari to the Colorado Supreme Court, they moved on the 10th day of May, 1990, for the Colorado Supreme Court to reconsider its denial. Since Colorado Appellate Rules provide for no Petition for Reconsideration with regard to a denial of a Petition for Certiorari, on May 11, 1990, the Petition for Reconsideration on Denial of Petition for Certiorari was stricken by the Colorado Supreme Court. Simply stated, raising constitutional issues in this manner was "too little and too late". At no time during the

entire appellate process in the Colorado Court of Appeals, or in their actual Petition for Certiorari to the Colorado Supreme Court, did Petitioners ever raise the constitutional issues now presented to this Honorable Court for the first time.

This Court, therefore, lacks jurisdiction since no federal questions have previously been properly raised in the Colorado trial court, Colorado Court of Appeals, or in the Colorado Supreme Court, as required pursuant to 28 U.S.C. §1257. Stated otherwise, and quite frankly, Petitioners first thought of asserting constitutional issues after becoming aware of the fact that this Court had granted certiorari in a totally different case, Pacific Mutual v. Haslip, 110 S.Ct. 1780, 108 L.Ed.2d 782, cert. granted April 2, 1990.

Petitioners are attempting, for the first time, to convert into novel constitutional questions disputed factual issues which were resolved against them by a jury and affirmed

by the Colorado Court of Appeals. Petitioners now raise constitutional claims that are so vaguely formulated and so lacking in theoretical focus[1] that a favorable ruling on Petitioners' behalf would generate more doubt about the award of punitive damages that it could ever hope to resolve. Such a ruling would do so without the offsetting benefit of having (in this case) a reasonable framework from which to instruct the states about how to bring a law of punitive damages into compliance with federal constitutional standards. A series of clarifying and qualifying decisions from this Court[2] would be

---

[1] Constitutional issues must be presented in clear cut and concrete form so that this Court can know exactly the elements of state law that are being called into question. See, Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Socialist Labor Party v. Gilligan, 406 U.S. 583, 589 (1972).

[2] Perhaps the most apt illustration of this is the Court's constitutionalization of the law of the defamation in New York Times v. Sullivan, 376 U.S. 254 (1964). In the intervening years, the Court has had to consider and

needed at a time when its dockets are heavily burdened and state legislatures throughout the country are effectively engaged in "tort reform", an important element of which is the examination of procedures and standards associated with the award of punitive damages.[3] The exemplary damages awarded by the jury in the present case are not excessive, are clearly reasonable, and are in appropriate ratio with the compensatory damages also awarded by the jury.[4] The Federal government has now passed the Employee Polygraph Protection Act of 1988 pre-empting this entire area of law to prevent the type of

---

decide many cases dealing with the scope of the New York Times rule. Tribe, American Constitutional Law, 861-890 (2nd Ed. 1988).

[3] Colorado is one of the states that has enacted tort reform measures concerning, inter alia, punitive damages. They became effective July 1, 1986. See, C.R.S. §13-21-102, as amended.

[4] The compensatory to punitive ratio is approximately one to one (one to two following court ordered remittitur).

abuse suffered by the plaintiff, thereby rendering all issues raised by Defendant-Petitioners non-viable and moot.[5]

The award of damages for the tort of outrageous conduct[6] are compensatory damages for injuries caused by intentional or reckless infliction of emotional distress. Compensatory damages may be assessed on one who, by extreme or outrageous conduct, intentionally or recklessly causes severe emotional distress to another subjecting him to liability for such emotional distress.[7] Exemplary or punitive damages are awarded to

---

[5] See 29 U.S.C. §2001, et. seq.

[6] Montgomery Wards Inc., Co. v. Andrews, 736 P.2d 40 (Colo. App. 1987)

[7] Restatement (Second) of Torts, §46 (1965)

punish the wrongdoer and to set an example.[8] The award of damages for outrageous conduct and punitive damages does not create a "doubling up" of damages nor does it violate due process.[9]

The facts, evidence and law of the case more than adequately support the verdict in this case. The Defendants stipulated to David Buckley's agency. All the experts including Defendants' experts agreed that the results of the polygraph were inconclusive, yet Buckley failed Plaintiff causing her severe financial

---

[8] Palmer v. A.H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219 (D. Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert denied, 434 U.S. 1052 (1976)

[9] Prohibition against double jeopardy relates to criminal or quasi criminal proceedings and not to a civil lawsuit involving an ancillary claim for punitive damages. Palmer v. A.H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984); Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, cert.denied, 464 U.S. 824 (C.A. Colo. 1981).

and emotional harm. He interrogated her mercilessly for over two hours. His abuse of authority, and his reckless, willful and wanton disregard for Tammie's rights and feelings, caused the jury to award appropriate punitive damages, as well as compensatory damages for her economic loss and emotional stress caused by his outrageous conduct. The ratio of compensatory damages to punitive damages awarded by the jury is approximately "one to one" and is, therefore, appropriate on its face, especially in light of the fact that Buckley interrogated a young, pregnant, naive and deeply religious girl for 2 to 3 hours after misreading his own graphs with the intention of verbally beating a confession out of her. After a remittitur by the trial court, accepted by Respondent, the ratio of compensatory to punitive damages was still a reasonable ratio of one-to-two ($59,400:$125,000). Furthermore, there were other witnesses (e.g., Debra Troppman) who

testified that Buckley had handled their polygraph examinations in a similarly callous manner, as well as additional evidence that the thefts in question were committed by others who had ultimately paid restitution.

II. STATEMENT OF FACTS

A. Plaintiff's Employer's Use of Polygraph Examination During the Investigation of Internal Theft at its Northglenn Store.

In their Brief, Petitioners significantly misstate the results of the scoring of Tammie Ellis' polygraph examination. Petitioners state that David Buckley reported merely that there were "significant emotional responses indicative of deception" when Tammie Ellis was asked questions about stealing merchandise and money from Fashion Bar. Buckley, in fact, reported that Tammie lied in her responses to those questions, stating in his report that:

> It is the opinion of the examiner, based on this subject's polygraph records, that she is not telling the truth on [these] questions. (Emphasis Added.) (Vol.X,Ex.1 and 1a; Tr.Vol.IV,p.590.)

In contrast, each expert called by both parties at trial testified that their scoring of Tammie Ellis' polygraph charts was inconclusive, meaning that there was no clear indication of either truth or deception (Tr.Vol.II,pp.281-285;Vol.III,p.318;Vol.IV,p. 630;Vol.V,p.738).

This testimony was extremely significant, since it was Plaintiff's employer's policy to treat "inconclusive results" as a "pass". A failure, on the other hand, resulted in immediate termination.

B. Background of Tammie Ellis.

Tammie Ellis grew up in Denver and graduated from Temple Baptist High School in Denver in 1981. During her upbringing and in recent years, much of her life has revolved

around church activities. She normally attends church services and activities three or four times per week, and currently attends Tri-Town Baptist Church (Tr.Vol.I,pp.90-93).

Tammie Ellis began working in 1981, immediately after graduating from high school. Her first job was as a cashier and cook at a K-Mart cafeteria. After her marriage in 1982, she took a job as a collator and secretary for Allied Computer in Littleton, Colorado. The job lasted approximately one year, until the company shut down. (Tr.Vol.I,pp.90-95).

At the time she applied for a job at Fashion Bar in May, 1983, Tammie Ellis was 20 years old. She had, for two years, held jobs requiring her to handle or have access to substantial amounts of money. Her reputation for honesty and truthfulness, which was extremely important to her, had never been in doubt. (Tr.Vol.I,pp.90-97).

According to Bob Ellis, Tammie's husband, Tammie's reputation was "the most important

thing to her in the world." Robert Rourk, pastor of Tri-Town Baptist Church, testified that Tammie was one of the most honest people he had ever met and that she was "very concerned" about her reputation for honesty and integrity (Tr.Vol.II,pp.180-189).

Almost immediately after she began working as a cashier at Fashion Bar, Tammie became aware that cash shortages at Fashion Bar were "an ongoing problem". The shortages continued throughout the next year. Approximately eight months after she began working at the store, Tammie was informed by store personnel that she and other employees would have to take a polygraph examination. She knew that cooperating with the store in taking the polygraph was a condition of her continued employment with Fashion Bar and she agreed to take the test without hesitation. (Tr.Vol.I, pp.99-101).

C. Examination by David Buckley.

The polygraph examination of Tammie Ellis was performed on February 2, 1984. Tammie arrived at the offices of John Reid and Associates at approximately 2:30 p.m. The examination began 15 minutes later (Tr.Vol.I,pp.102-103).

The examination room was small. Only Tammie and David Buckley were present. Before Tammie was "hooked up" to the polygraph machine she informed Buckley verbally she might be pregnant (as it turned out she was, even though she had checked "no" on his questionnaire.) Buckley then asked her whether she had ever stolen anything in her life. Her response was that the only thing she had ever stolen in her life was a piece of gum. Buckley, apparently not believing the response to this initial question, told Tammie that "nobody's that honest" and repeatedly questioned her on what else she had stolen in her lifetime. She repeatedly denied that she

had ever stolen anything except a piece of bubble gum. In Tammie's view, Buckley "didn't believe me from the start" (Tr.Vol.II,pp.104-126.)

The polygraph test lasted 15-20 minutes. After the polygraph test was concluded, Buckley informed Tammie that she had failed the test. He then began his interrogation of her (Tr.Vol.I,pp.107-109).

David Buckley's interrogation of Tammie Ellis lasted two to three hours (Tr.Vol.I,pp. 112-113; Vol.IV,p.593). Buckley did most of the talking, not allowing Tammie any significant time to respond (Tr.Vol.I,p.112).

To Tammie, it appeared that David Buckley had made up his mind about her. He refused to believe anything she was saying. He was excited, and was "short and sharp" with her. He "wanted a confession from me that I couldn't give." (Tr.Vol.II,P.126).

As the hours went by, Buckley continued to press Tammie on what she might have "stolen"

from Fashion Bar that could have caused the negative responses on the polygraph test. Tammie told Buckley she exchanged wheat pennies from the cash register with pennies of her own. Buckley accused her of stealing them, which Tammie denied. (Tr.Vol.I,p.111).

Tammie also told Buckley that she had, with the permission of her manager, deferred paying ten cents for a bag of potato chips from the Fashion Bar employees' break room. She later repaid the ten cents and didn't regard the incident as "stealing" (Tr.Vol.I,p.112).

As the interrogation dragged on, Tammie began to cry. She felt that despite her honesty with Buckley, he clearly did not believe her. Rather, he persisted in accusing her of stealing from her employer (Tr.Vol.II,p.127). Buckley noted on his charts that he felt Tammie's tears were "phony and inappropriate." (Tr.Vol.III,p.363).

The interrogation finally ended after 6:00 p.m., over an hour after the offices of John

Reid and Associates had closed (Tr.Vol.I,p. 114). According to Tammie, Buckley stopped his questioning only after somebody came to the examination room and told Buckley that it was after 6:00 p.m. and that Tammie had to leave. Bob Ellis, Tammie's husband, had been waiting for Tammie. After the receptionist left at 5:00, Bob tried the door to the examination room and found it locked. After 6:00 p.m., he finally saw someone in the back room and asked him to check to see if the examination was over (Tr.Vol.I,p.114;Vol.II,p.178).

At no time did David Buckley advise Tammie that she could leave the room, and she did not feel that she was free to leave the room as long as Buckley was talking to her (Tr.Vol.I, pp.108-113).

At trial, David Buckley testified that he might well have continued his interrogation of Tammie had she stayed longer. At the time Tammie left the examination room, crying,

Buckley told her that he thought the longer she sat in the room with him, the more he could "get out of her" (Tr.Vol.II,p.128; Vol.IV,p.596).

D. David Buckley's Report to Fashion Bar.

Following his polygraph examination of Tammie Ellis, David Buckley made a written report of his findings to Fashion Bar. In his report, Buckley stated that he had asked Tammie whether she had stolen merchandise or money from Fashion Bar, or knew anyone who had. Tammie's answers to each one of these questions was "no" (Tr.Vol.III,p.364). In his conclusion to the report to Fashion Bar, he wrote that, "It is the opinion of the examiner based on the subject's polygraph records that she is not telling the truth" with regard to stealing merchandise or money from Fashion Bar, or knowing someone who had (Tr.Vol. III, p.364).

He also reported she admitted stealing pennies and potato chips (Vol.X, Ex.1 and 1a) which is a blatant misstatement of the facts. (Tr.Vol.III,p.410).

At trial, Buckley acknowledged that he could not tell from the examination whether the reaction he saw on Tammie Ellis' polygraph results were caused by her concerns over the exchange of wheat pennies, her concerns over borrowing ten cents for potato chips, or whether it was related to more important matters. He never stated in the report that Tammie's apparent "deception" was anything less than an indication that she had been stealing significant amounts of money and/or merchandise from Fashion Bar (Tr.Vol.III,p.365).

Buckley contended that he reported orally to Larry Neumayr, director of loss prevention for Fashion Bar, that his conclusions might merely reflect Tammie's concerns over

exchanging wheat pennies, or borrowing ten cents for potato chips (Tr.Vol.III,p.388).

This testimony was directly contradicted by Larry Neumayr, who testified at trial. Mr. Neumayr testified that Buckley told him only that Tammie had failed the test, and that she had admitted "stealing" wheat pennies and potato chips (Tr.Vol.III,p.410). Buckley never told him that Tammie could have "failed" merely because of her concerns about the wheat pennies and potato chips (Tr.Vol.III,p.410). In fact, from the report tendered by David Buckley, Mr Neumayr assumed that there were "serious reasons" why Tammie Ellis didn't pass the test. If, in fact, Tammie had failed the test merely due to her concerns over a bag of potato chips and exchanging wheat pennies, Mr. Neumayr would have met with her and worked out the problem (Tr.Vol.III,pp.468-471).

After the test, Tammie's father, Richard Farmer, called Buckley to ask about a re-test. Buckley informed him that the re-test would

cost $300, more than twice the amount that Fashion Bar had been charged for Tammie's initial examination (Tr.Vol.III,pp.369-370).

E. Emotional Distress and Economic Damage Suffered by Tammie Ellis.

When Tammie Ellis walked out of the examination area, her husband Bob could tell she had been crying. Bob Ellis described his wife as "fractured" following the examination (Tr.Vol.II,pp.179-180). She was scheduled to return to work following the test, but was too upset to do so ("I was upset because I had been accused of something I knew I didn't do, and I just could not work") (Tr.Vol.II,p.128).

When Tammie returned to work the following day, she was treated "like a criminal". She was told to stay away from the cash registers, to stay away from the men's apparel desk, and not to tell anyone what had happened. (Tr.Vol. II,p.130). She was told to give up the Fashion Bar pen she was holding so the pen

wouldn't be taken (Tr.Vol.II,p.129). That afternoon, she was told she was suspended for three days for failing the polygraph test. (Tr.Vol.II,p.131).

After the three day suspension, Tammie again returned to Fashion Bar. At that time, she was fired because of the polygraph results. She was told to gather her belongings and leave immediately (Tr.Vol.II,pp.132-135).

Subsequent to her firing, Tammie requested a copy of the report Fashion Bar had received from Buckley. She received it ten days after her termination and had to pay Buckley $3.00 to get it. After reading the report, Tammie "just felt crushed". In addition to stating that she had lied about stealing merchandise and money from Fashion Bar, the report inaccurately stated that she had admitted "stealing wheat pennies and potato chips". ("I knew I was honest and this letter says I'm not. It just destroyed anything I had that

was important to me...") (Tr.Vol.II,pp.136-138).

For the two weeks following her termination from Fashion Bar, Tammie refused to leave her home. She refused to go anywhere. It took the family two weeks to get her to go out and walk around the block. She was depressed, and, according to her husband, "cooped up in her own little world." She withdrew from family and friends, and was embarrassed to go out in public (Tr.Vol.II,pp.137-140,181-182).

Tammie felt that Buckley's report had reached Fashion Bar managers, who would always regard her as "a liar and a thief." To this day she avoids the Northglenn Mall and will not go near a Fashion Bar. (Tr.Vol.II,p.142).

After receiving the report, Tammie sought counseling from her pastor, Robert Rourk. He recalled her as being "very concerned and pretty shaken up". She was worried not only about a "flaw in her record," but that despite her innocence, "other people would believe

that perhaps she was guilty". Tammie continued to see Pastor Rourk on occasions when she "got depressed and real down". In Pastor Rourk's opinion, Tammie suffered permanent and irreparable emotional damage as a result of the incident ("I assure you that as I know her, that it is something that she is going to suffer for probably the rest of her life to a degree, even if the thing were cleared up...") According to her husband Bob, Tammie "to this day sometimes mentally locks herself up in her room." (Tr.Vol.II,pp.149, 190-193).

Several years after the incident, Buckley's report still affected Tammie's self-confidence and ability to obtain employment. After the birth of her child, Tammie's family had to "push" her into going out to apply for jobs. Tammie felt she had to be honest on job applications and indicate that she had been fired by Fashion Bar (Tr.Vol.II,pp.142-148). As a result, she was unemployed for "about a

year" due to her inability to get a job (Tr.Vol.II,p.147).

Tammie's termination from Fashion Bar caused the Ellis family substantial financial hardship. At the time Tammie was fired, Bob Ellis was in school training to be a police officer. As a result of her termination, he had to quit school and take a job in order to support his family. Bob and Tammie were forced to borrow money from their parents in order to pay their mortgage. They "got behind" on bills and lost their good credit rating. Having lost the medical benefits that were part of her employment at Fashion Bar, Tammie had to pay the costs associated with the birth of her child, which amounted to approximately $3,000 (Tr.Vol.II,pp.143-146).

F. Expert Testimony.

1. Cleve Backster. Plaintiff's expert witness, Cleve Backster has been involved in the polygraph field for 39 years, and has

taught polygraphy to both the CIA and the FBI. He has consulted with numerous governmental agencies that use polygraph, and co-founded the National Training Center of Lie Detection in New York City. He has directed 119 polygraph courses, has been involved in well over 50,000 polygraph cases and is a charter member of the American Polygraph Association (Tr.Vol.II,pp.204-208,234-239).

In Cleve Backster's opinion, David Buckley acted below the standard of care for polygraph examiners in finding that Tammie Ellis lied when she stated she had not stolen any merchandise or money from Fashion Bar. In Mr. Backster's opinion, the charts of Tammie Ellis' polygraph examination were clearly inconclusive, meaning that there was no clear indication one way or the other as to truth or deception (Tr.Vol.II,pp.281-284).

Mr. Backster was familiar with the Reid technique and the Reid checkmark scoring system which differs slightly from the

numerical method that is customarily used in the industry, and which he introduced in 1959. Regardless of whether the Reid checkmark method or numerical scoring was used, however, it was Mr. Backster's opinion that "any competent examiner" reading Tammie Ellis' polygraph charts would conclude that the polygraph results were inconclusive, rather than indicative of deception (Tr.Vol.II, pp.288, 295 and 302).

2. Joseph B. Smith. Joseph Smith, also called to testify on behalf of Tammie Ellis, owns and runs Aurora Polygraph and Consultant Services, Inc. He has performed over 8,000 exams since 1974, both for his business and for the Adams County Sheriff's Department. He is a member and past president of the Colorado Association of Polygraph Examiners (Tr.Vol.II,pp.307-313).

Mr. Smith testified he was familiar with the checkmark scoring system used by David Buckley in his scoring of Tammie Ellis'

polygraph examination. In Mr. Smith's opinion, the charts of Tammie Ellis' polygraph examination were clearly inconclusive, and, as such, it was substandard for David Buckley to report that Tammie Ellis' answers to the questions of whether she stole money or merchandise from Fashion Bar indicated deception (Tr.Vol.II,pp.318-324).

3. David Buckley. Even David Buckley, defendant in this action, equated the checkmark scoring system that he commonly uses, to Backster's numerical system commonly used by the majority of polygraphers and all of the other experts. Buckley testified that both systems are methods of quantitatively analyzing a polygraph chart. Buckley's use of light, medium and heavy checkmarks correlate to the numerical assignments of one, two and three. (Tr.Vol.III,p.506, 512).

Although Buckley denied any improper scoring of Tammie Ellis' polygraph examination, he made several key admissions:

(1) he failed to afford an opportunity to Tammie Ellis for a re-test, as required by standard 6 of the American Polygraph Association Standards and Principles of Practice (Tr.Vol.IVA,pp.8-13); (2) although he denied misreporting the results of his examination of Tammie Ellis, he did state that the American Polygraph Association Code of Ethics provides that it is gross negligence for a member to misreport the results of an exam (Tr.Vol.IVA,p.49).

4. Defendants' Expert Witnesses. Frank Horvath and Lynn Marcy, both polygraphers, were called as defense experts. While both experts generally defended Buckley's scoring of Tammie Ellis' polygraph examination, both scored the examination as "inconclusive," and not as deceptive as Buckley had scored it. (Tr.Vol.IV,pp. 630, 646).

ARGUMENT

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE MISSTATED THE EVIDENCE

Petitioners have significantly misstated the evidence at each stage of appeal in this case. In Tacon v. Arizona, 410 U.S. 351 (1973), this Court noted that a Writ of Certiorari will be dismissed as improvident where the only relevant issues raised in state courts were primarily factual issues as they are here.

For example, the Petitioners point out under the heading entitled: "Evidence Pointing to Ellis' Guilt":

> Prior to administering a polygraph examination and interviewing Ellis, Buckley had been told by another Fashion Bar employee that she had seen Ellis take some money from the cash register at Fashion Bar and place it in an envelope containing her personal cancelled checks. The other employee also stated that she saw Ellis place the envelope under her desk, and that she thought Ellis was probably stealing the money...

This is all true except it was not presented at trial. This is most likely because Plaintiff had a 3' x 5' blow-up exhibit of a cancelled check written by Ellis to Fashion Bar which her supervisor had approved for her to cash. The other employee that witnessed this incident was not unavailable at trial as Petitioners indicated. Defendants simply elected not to call her after reviewing Plaintiff's exhibits. This witness had not moved or even changed employers prior to trial, and Plaintiff was ready to call her as a rebuttal witness if necessary.

The facts are that Buckley was convinced of Tammie's guilt prior to the examination and never gave her a chance to explain the fact that she had been seen simply cashing an employer-approved check. Buckley never asked Tammie during the 2 - 3 hour interrogation about the statement! He then used his superior position and the spectra of the

polygraph machine to berate and harass a pregnant, naive and deeply religious girl for 2 -3 hours, not letting her leave until over an hour after his office had closed, and all the while keeping her husband locked out of the interrogation room!

Buckley misread his own graphs according to each and every expert at trial, including his own, and then recklessly cost Plaintiff her job and more importantly her confidence and self-respect. The fact that another Fashion Bar employee, Debra Troppman, testified that Buckley had treated her in a similar manner showed a pattern of intentional misbehavior that deserves to be punished.

II. THIS COURT LACKS JURISDICTION

Defendant-Petitioners incorrectly claim that they have properly asserted jurisdiction under 28 U.S.C. §1251(a). 28 U.S.C. §1251(a) gives the U.S. Supreme Court original and exclusive jurisdiction of all controversies

"between two or more states." Because this case does not involve a controversy between two or more states the Defendant-Petitioners do not have jurisdiction under 28 U.S.C. §1251(a).

Defendant-Petitioners have for the first time raised federal constitutional issues, basing their Petition on Pacific Mutual v. Haslip, 89-1279, cert. granted, 110 S.Ct. 1780, 108 L.Ed.2d 782, 89-1279, 58 Law Week 3625, ruling below 553 S.2d 537 (Ala. 1989). At no time were any of the Federal constitutional issues of Pacific Mutual, supra, which are now being presented by the Petitioner, raised, argued, considered or ruled upon in a Colorado trial or appellate court. Therefore, this Court also lacks jurisdiction under 28 U.S.C. §1257 to consider the Federal constitutional issues so belatedly presented by Petitioners.

28 U.S.C. §1257(3) provides that this Court may grant certiorari where "the validity of a

State statute is drawn in question on the ground of its being repugnant to the constitution..." However, this ground was never argued, considered or ruled upon in the trial court, the Colorado Court of Appeals or the Colorado Supreme Court.[10]

Jurisdiction of the United States Supreme Court to review a judgment of the highest court of a state turns upon whether a Federal right was specifically set up or claimed in that court and denied by its decision. To be effective for this purpose, an assertion of a Federal right must at least have "fair color of support" and not be frivolous or wholly

---

[10] No constitutional "due process" issues were raised by Petitioners in the Colorado Court of Appeals or in the Colorado Supreme Court. After the Colorado Supreme Court had denied the Petition for Certiorari, Petitioners filed a subsequent Motion to Reconsider Denial of Petition for Certiorari, which did, for the first time, raise constitutional issues. This Motion to Reconsider, however, was stricken by the Colorado Supreme Court as untimely and not authorized by Colorado Appellate Rules (C.A.R. 54).

without foundation; a Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for exercise by the Federal Supreme Court of its appellate jurisdiction over the state court. Parker v. McLain, 237 U.S. 469 (1915).

The general rule is that questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal to the United States Supreme Court. Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334, (1959); Dick v. New York Life Ins. Co., 359 U.S. 437, (1959).

The United States Supreme Court does not have jurisdiction to consider or entertain particular questions or matters not raised at a state court level, as with respect to relief, causes of action or grounds for recovery, grounds of defense or opposition, or constitutional questions. Hull v. Burr, 234 U.S. 712, (1914); Weade v. Dichmann, Wright

and Pugh, 337 U.S. 801, (1949); United Rys & Electric Co. of Baltimore v. West, 280 U.S. 234, (1930); Shelley v. Kraemer, 334 U.S. 1, (1948).

The United States Supreme Court will not ordinarily decide questions of local law independently, but will look to the trial court for aid in dealing with issues of state law that enter into judgments. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); U.S. v. Durham Lumber Co., 363 U.S. 522 (1960). The United States Supreme Court usually accepts and will not disturb the determination of the state appellate court on such questions in the absence of plain error. Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959); Spiegel's Estate v. C.I.R., 335 U.S. 701 (1949); U.S. v. Kimball Foods, Inc., 440 U.S. 715 (1979); New Haven Inclusion Cases, 399 U.S. 392 (1970). Fact findings of the trial court are given great weight and will be accepted by the Supreme Court unless

clearly erroneous. Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948); Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

A party cannot assume an attitude inconsistent with or different from that taken by him at the trial level when a cause is brought up for review to the Supreme Court. Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, (1907). Petitioner is restricted to the theory on which the cause was defended in the state court. Weade v. Dichmann, Wright and Pugh, supra. The Petitioners cannot change their theory or position as to the nature of the cause of action or their defense. San Juan Light & Transit Co. v. Requena, 224 U.S. 89, (1912); Thomas v. Taylor, 224 U.S. 73, (1912).

Explicit and timely insistence in state court that a state statute is repugnant to the Federal Constitution, treatises or laws, is a requisite to jurisdiction of the United States

Supreme Court (under 28 U.S.C. §1257) to review, on appeal, judgment of a State Court upholding the statute. Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960).

Jurisdiction of the Supreme Court does not depend on whether the state court addressed a federal question; it is enough that the federal claim was made and not accepted; but the Supreme Court would not have jurisdiction under §1257 if the federal question was neither raised nor decided in the state proceedings. Lynk v. LaPorte Superior Court No.2, 789 F.2d 554 (CA 7 Ind 1986). [Emphasis added].

Rule 10 of the United States Supreme Court Rules provides that review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted "only when there are special and important reasons therefore." The following, while neither controlling nor fully measuring the Court's discretion, indicates the character of reasons

that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings...

(b) When a state court of last resort has decided a federal question...

(c) When a state court ... has decided an important question of federal law which has not been, but should be decided by this Court..."

Viewing the facts, evidence and law of this case as set forth in the decisions of the trial court, Colorado Court of Appeals and denial of certiorari by the Colorado Supreme Court (as attached to Petitioners brief as Appendices) it is apparent that no federal

question was ever raised, argued, considered or ruled upon.

In this case the validity of Colorado's Punitive Damage Statute, C.R.S. §13-21-102, was never challenged and therefore this Court lacks jurisdiction or should at least deny discretionary review under 28 U.S.C. §1257.

In this case, Petitioners have simply copied the issues in Pacific Mutual v. Haslip, supra, even though the entire factual and statutory background is completely different, both in posture and in the underlying substantive state law being appealed. This is not enough. The federal question necessary to appellate jurisdiction in the United States Supreme Court must be one not in mere form, but in substance. Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388 (1920).

III. DEFENDANT-PETITIONERS HAVE MISSTATED THE FACTS, EVIDENCE AND LAW OF THIS CASE TO CONFORM THEM TO ANOTHER CASE PRESENTLY BEFORE THIS COURT UNDER VERY DIFFERENT FACTS.

Pacific Mutual Life Insurance Company v. Haslip, supra, deals with a situation where Alabama provided no statutory guidelines or standards for a jury to use in awarding punitive damages. They were entirely discretionary in Alabama at the time of the acts that gave rise to Pacific Mutual. There has always been a controlling statute in Colorado setting forth adequate guidelines for the assessment of punitive damages as well as considerable case law further defending the jury's role in assessing punitive damages.

The United States Supreme Court in Pacific Mutual, supra is also considering the issue of whether or not an award of punitive damages when applied against a corporate defendant for the unauthorized acts of its agent violates the corporation's right to due process. This is not the issue presented here. In this case, Defendants stipulated to their employee's agency and stipulated to the application of respondeat superior. Also, the

underlying facts in Pacific Mutual, supra are much different. There, the corporate defendant presented its case by claiming that the agent was outside the scope of his agency at the time he committed the acts which gave rise to the punitive damage award. Defendants cannot now claim that even though they stipulated to David Buckley's agency and the application of respondeat superior, that they should be protected against an award of punitive damages for his individual acts.

IV. EVEN ASSUMING ARGUENDO THAT A PROPER ISSUE UNDER FEDERAL LAW EXISTS, THE STANDARDS FOR THE IMPOSITION OF EXEMPLARY DAMAGES UNDER COLORADO STATUTES, JURY INSTRUCTIONS AND CASE LAW ARE CONSISTENT WITH THE DUE PROCESS CLAUSE AND THE HOLDINGS OF THIS COURT. THE CASES CITED BY PETITIONER ARE WHOLLY DISTINGUISHABLE AND NOT CONTROLLING. THE EXEMPLARY DAMAGES AWARDED BY THE JURY IN THE PRESENT CASE ARE NOT GROSSLY EXCESSIVE, ARE CLEARLY REASONABLE, AND ARE IN AN APPROPRIATE RATIO TO THE COMPENSATORY DAMAGES ALSO AWARDED BY THE JURY.

At the time this case arose, a Colorado statute, C.R.S. §13-21-102 (1973), provided:

> Exemplary Damages. In all civil actions in which damages are assessed by a jury for a wrong done to a person, or to personnel or real property, and the injury is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages under this statute.

In light of this statute, Colorado courts instructed juries, as in the present case, consistent with Colorado Jury Instructions - Civ. 2d 5:3 (1980) that:

> If you find in favor of the plaintiff, and award actual damages, then you should consider whether the plaintiff is entitled to exemplary damages. If you also find <u>beyond a reasonable doubt</u> that the injury complained of was attended by circumstances of insult or a wanton or reckless disregard of the rights and feelings of the plaintiff, then in addition to any actual damages, you may also award the plaintiff a <u>reasonable</u> sum as exemplary damages. Exemplary damages are not to be construed as compensation to the plaintiff for wrong done, but as punishment to the defendant, and as an example to others. [Emphasis added.]

A jury finding of punitive damages in Colorado is supported if the evidence is sufficient to support a determination "beyond a reasonable doubt" that defendant acted with a wanton and reckless disregard of the rights of plaintiff. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219 (D.Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed, 434 U.S. 1052 (1978).

Although exemplary damages are not automatic, they are designed to inhibit or deter the type of conduct for which they are awarded, and are assessed in addition to actual damages even though they can both arise from the same conduct. Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974); Enright v. Graves, 560 P.2d 851 (Colo. 1977). They are not double punishment. E.F. Hutton & Co. v. Anderson, 42 Colo. App. 497, 596 P.2d 413 (1979).

The purpose of exemplary damages is not to compensate the plaintiff, as is the purpose of damages for outrageous conduct, but rather to punish the defendant. Leidhold v. District Court, 619 P.2d 768 (Colo. 1980); Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980).

The amount of a punitive damage award is within the discretion of the jury and need not be strictly proportionate to the amount of compensatory damages so long as the record shows that the jury was properly guided by the criteria for assessing punitive damages. Walford v. Blinder, Robinson and Co., Inc., 793 P.2d 620 (Colo. App. 1990); Palmer v. A. H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984); and Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. App. 1985), but see §13-21-102(1)(a) C.R.S. (1987 Repl.Vol.6A) (limiting exemplary damages in causes of action arising after July 1, 1986).

The guiding criteria for assessing an award for punitive damages are: "(1) The nature of

the act which caused the injury; (2) the economic status of the defendant; and (3) the deterrent effect of the award on others." Walford v. Blinder, Robinson & Co., Inc., supra; Palmer v. A. H. Robbins Co., supra.

The fact that in the present case the jury's ratio between compensatory damages ($122,000.00) and punitive damages ($125,000.00) was very nearly a one-to-one ratio, and that after remittitur they remain at approximately one-to-two ($59,400:$125,000), indicates that the relationship between compensatory and punitive damages is reasonable. See, Frick v. Abell, 602 P.2d 852 (1979) (1:3 ratio upheld); Palmer v. A. H. Robbins Co., Inc., supra (10:1 ratio upheld); and Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982) (10:1 ratio and 35:1 ratio upheld).

Obviously, Colorado law provided much more than no standards for awarding punitive damages, as Defendant-Petitioners allege and

as this Court is considering in Pacific Mutual v. Haslip, supra.

Colorado courts and Federal courts have also held that C.R.S. §13-21-102 (1973) did not constitute double punishment, did not violate equal protection, was not void for vagueness, was not or cruel and unusual punishment, and was intended to authorize an award of exemplary damages for the purpose of punishing persons who have inflicted injuries with malice. E.F. Hutton & Co. v. Anderson, supra; Palmer v. A.H. Robbins Co., Inc., supra; Wegner v. Rodeo Cowboy's Ass'n, 290 F.Supp. 369 (D.Colo. 1968) aff'd and rehearing denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903 (1970).

As above stated, the purpose of exemplary or punitive damages is to protect the health, property, economic and civil rights of citizens not only by compensating those whose rights are invaded, but also by punishing and deterring similar future gross misconduct.

This is the very basis of the "fault" principle in tort law. Punitive damages merely increase the severity of the warning function of compensatory damages.

Furthermore, compensatory damages alone are not adequate to achieve this goal, particularly where the misconduct is intentional or willful as it was in this case. Actual damages have no relation to the reprehensibility of misconduct. Nor do compensatory damages effectively deter violations of constitutional rights which though valuable, do not entail great monetary consequences. Carlson v. Green, 446 U.S. 14, 22 n.9 (1980) (in such cases, "punitive damages may be the only significant remedy.")

Respondent recognizes that some members of this Court have expressed concern about the clarity of the legal standards used to limit the size of punitive damage awards in civil cases. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. ____, 109 S.Ct. 2909,

2923-24, 106 L.Ed. 2d 219 (1989). Undoubtedly the laws of some states have specific flaws that are of sufficient importance nationally to justify the exercise of jurisdiction by this Court. But the law of Colorado, as applied to this case concerning the award of punitive damages, is reasonably calculated to produce fair outcomes. The law of Colorado presumes the basic right to trial by jury in tort cases, but at the same time recognizes that lay persons on the jury need some guidance to decide whether to award punitive damages in the first place and, if so, in what amount. The jury's decision is not final. If it reaches a verdict that is demonstrably excessive, both the trial and appellate courts have ample authority to set aside unlawful and unjust punitive damage awards, or to order an appropriate reduction.

Within this framework, the Petitioners did not fare as well as they would have wished. But the Petitioners' distaste for the outcome

below does not readily transform this case into an example of the evil of a runaway jury eager to climb into the pocket of a wealthy, but hapless defendant. This Petition for Certiorari represents the last hope of the Petitioners in their quest to avoid liability for their involvement in Tammie Ellis' tragedy, a journey that began some six years ago. At this juncture, the case is truly a dispute between the parties without any national or constitutional import.

V. THE AWARD OF BOTH EXEMPLARY OR PUNITIVE DAMAGES (TO PUNISH THE WRONGDOER AND SET AN EXAMPLE) AND DAMAGES FOR OUTRAGEOUS CONDUCT (COMPENSATORY DAMAGES FOR INJURIES CAUSED BY INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS) IS IN NO SENSE A "DOUBLING UP", DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION, AND DOES NOT EVEN RAISE A CONSTITUTIONAL QUESTION.

Under Colorado law, outrageous conduct and punitive damages have long been held to be distinct and separate awards. See: Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987); Montgomery Wards Co., Inc. v. Andrews, 736

P.2d 40 (Colo. App. 1987); Meiter v. Cavanaugh, 580 P.2d 399 (Colo. 1978); DeCicco v. Trinidad Area Association, 573 P.2d 559 (Colo. App. 1977); Wegner v. Rodeo Cowboy Ass'n., supra; Enright v. Graves, supra. As stated in Restatement (Second) of Torts, §46 (1965), adopted by the Colorado Supreme Court in Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970), compensatory damages may be assessed on one who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another subjecting him to liability for such emotional distress.

Petitioners cite Knierim v. Izzo, 22 Ill.2d 73, 174 N.E. 2d 157 (1961), as support for their argument that damages for outrageous conduct and punitive damages are duplicative and somehow constitute a constitutional violation.

Knierim, supra, involved claims for murder, wrongful death, and outrageous conduct and "no

limit was placed on the amount of compensatory damages, so it was reasonable to assume the same amount would properly punish the wrongdoers." footnote 7. UNR Industries, Inc. v. Continental Ins. Co., 607 F.Supp. 855 (D.C.Ill. 1984). Knierim, supra, is a limited aberration of the law even in Illinois, where courts do allow both outrageous conduct and punitive damage awards. See, Gilardi v. Schroeder, 672 F.Supp. 1043 (N.D. Ill. 1986).

Other jurisdictions have flatly refused to adopt Knierim, supra and its limited progeny, dismissing them summarily as without merit. Fletcher v. Western National Life Insurance Co., 89 Cal. Rptr. 78 at 95 (C.A. 4th Dist. 1970); See also, State Rubbish Etc. Ass'n v. Silizmoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). Knierim, supra is cited most often as simply the first case in Illinois to recognize outrageous conduct.

The 10th Circuit addressed the issue of duplication in Malandris v. Merrill Lynch,

Pierce, Fenner & Smith, 703 F.2d 1152 (1981) at 1171, footnote 7, saying, "[I]t is clear under Colorado law both compensatory and punitive damages may be awarded...", citing Enright v. Graves, supra. Implicitly the 10th Circuit also held that such an award of both punitive damages and damages for outrageous conduct did not violate due process.

VI. ALL VIABLE ISSUES ARE MOOT AS A MATTER OF LAW

There are no viable issues to be considered on appeal since Colorado has amended Colorado statute C.R.S. §13-21-102 in 1986 to provide an even more detailed statute regarding punitive damages, and the Federal government has preempted the area of civil law addressed in this action by passing the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, et. seq.

Rule 10 of the Supreme Court Rules requires special and important reasons to review

decisions of lower courts. No such reasons are presented here. To the contrary, Defendant-Petitioners' claims raise only misplaced and moot questions. An appeal from a judgment of the highest court of a state will be dismissed by the United States Supreme Court where resolution of the constitutional issues presented by an appellant is not appropriate in the circumstances of the case. De Backer v. Brainard, 396 U.S. 28 (1969). A federal question sufficient for consideration by the Supreme Court must not be merely abstract or moot. Little v. Bowers, 134 U.S. 547 (1890); Kimball v. Kimball, 174 U.S. 158 (1899). The concern of the Supreme Court is to see that substantial justice is done, not to search the record for possible errors. Williams v. U.S., 341 U.S. 97, (1951). Any matter involved in the case on review in the Supreme Court which has become an abstract or moot question will not be reviewed. First National Bank of Arizona v. Cities Service

Co., 391 U.S. 253 (1968), rehearing denied, 393 U.S. 901 (1968).

CONCLUSION

In every person's life, whether such a person lives to be twenty or one hundred years old, there are certain days that remain etched in memory forever--the day a loved one dies, the day of the birth of a first child, and so forth. Such a day is that on which Tammie Ellis was mercilessly interrogated by Defendant Buckley and subsequently incorrectly reported as being deceptive on a polygraph test and implicitly guilty of theft. She lost not only her job, but more importantly, she lost what little confidence she had at her young age and just about all of her self-esteem. In this regard, the trial court judge had no problem finding that the conduct on the part of Petitioners should be submitted to the jury's determination of whether it constituted "outrageous conduct", entitling her to

compensatory damages, or circumstances of "fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings", entitling her to punitive or exemplary damages:

> "Now, this is evidence taken in the light most favorable to the Plaintiff. By that standard, I have no trouble with my duty as a judge of this Court to say that that would fit within the extreme and outrageous conduct. Again, I am not adopting any conclusion of fact, but given the evidence of record, the weight that is most favorable to the Plaintiff, that's what's there." Tr.Vol.III, p. 440.

Colorado was not a state with no standards governing the imposition by a jury of punitive or exemplary damages at the time this case arose and was tried. As discussed below, guidelines were provided not only by statute, but also by detailed jury instructions; by the trial court in deciding whether the issues of outrageous conduct and punitive damages should be submitted to the jury in the first place,

and subsequent to the trial in ordering a remittitur; and by the Colorado appellate courts in applying standards developed in the Colorado case law. The entire process shows a sensitivity by the State of Colorado to the need for guidelines in cases involving facts which give rise to claims for punitive or exemplary damages or outrageous conduct. The resulting verdict, as affirmed by the Colorado Court of Appeals and the Colorado Supreme Court, is reasonable, not excessive, and in no way violates due process.

Finally, and perhaps most importantly, it is respectfully submitted that this Court totally lacks jurisdiction under 28 U.S.C. §1257, and for this reason alone the Petition for Certiorari should be denied. Petitioners never raised any constitutional or due process issues in the Colorado trial court, the Colorado Court of Appeals, or in their Petition for Certiorari to the Colorado Supreme Court. It is totally improper and

disingenuous for these issues to be raised for the first time in the United States Supreme Court. Nor is this a case where the issues have been framed in such a manner that their determination could provide some beneficial guidelines to other states struggling to "fine tune" their handling of claims for punitive damages.

This case began in early 1984. Tammie Ellis has been enduring this "living nightmare" for over six years. It is time for this tragedy to now come to an end, and this Court should deny the Petition for Certiorari for all the reasons above stated.

Respectfully submitted,

JOHN G. SALMON
Counsel of Record
MARK L. ANDERS
FRANCINE R. SALAZAR
SALMON, GODSMAN &
NICHOLSON, P.C.
Salmon Law Building
7450 East Progress Place
Englewood, Colorado 80111
(303) 771-9900
Attorneys for Respondent

September 19, 1990